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The Progressive User Tax as an Alternative Method of Financing Civil Jury Costs

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THE PROGRESSIVE USER TAX AS AN ALTERNATIVE METHOD OF FINANCING CIVIL JURY COSTS

In civil cases, litigants often bear some of the court costs through assessments such as docket fees, court issued paper fees, and clerk service fees.[1] While those fees generally do not fully support the court's operation, they help defray many general expenditures.[2] One general expenditure is civil jury costs.[3] In some states civil jury costs may be assessed, like other court costs, against the losing party.[4] In other states, the civil jury costs may be paid by the political subdivision.[5]

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1. In Indiana, these fees are assessed by statute. IND. CODE § 33-6-1-17 (1971), IND. ANN. STAT. § 4-5820 (Supp. 1973).

2. Justice Harlan, in Boddie v. Connecticut, 401 U.S. 371, 381-82 (1971), noted:

> The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational . . . .
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> . . . [T]he State invariably imposes the costs as a measure of allocating its judicial resources.

3. Jury costs, for the purpose of this note, are defined as per diem, mileage allotments, lodging and meals expenses for jurors, including both the trial jury and the panel from which they are chosen. However, in litigant-funding jurisdictions, see text accompanying note 10 *infra*, jury costs for which litigants are liable accrue only at trial. *E.g.*, Turlock Gulf & Country Club v. Superior Court, 240 Cal. App. 2d 693, 50 Cal. Rptr. 70 (1966); CAL. CIV. PRO. CODE § 1032.5 (West 1955); *id.* §§ 196, 196.1, 631, 1031 (West Supp. 1974).

4. States having such a system include: California, CAL. CIV. PRO. CODE § 1032.5 (West 1955); Florida, FLA. STAT. ANN. § 40.25 (1961); and Nevada, NEV. REV. STAT. §§ 69.010 - .050 (1973).

5. The states of the Seventh Circuit all require jury costs to be borne by the county. IND. CODE § 33-4-5-8 (1971), IND. ANN. STAT. § 4-7117 (1968); IND. CODE § 17-2-44-5 (1971), IND. ANN. STAT. § 5-807 (1968); ILL. ANN. STAT. ch. 53, § 62 (Smith-Hurd 1974); WISC. STAT. ANN. § 270.165 (1957). In Wisconsin the court has the option to assess one day's jury fees against either party, the county paying the balance. WISC. STAT. ANN. § 255.24 (1971).

Indiana has two standards of jury cost assessment. On the one hand, for petit and grand juries the county pays the costs, while for special "struck" juries the demanding party must pay. IND. ANN. STAT. § 34-1-20-3 (Code ed. 1973). A special jury is one ordered by the court, on the motion of either party, in cases of unusual importance, and a "struck" jury is a special jury constituted by striking out a number of names from a prepared list. 50 C.J.S. *Juries* § 5 (1947). This can be viewed as a legislative determination as to how far the government's obligation to provide a free litigation forum extends. Also the time and cost involved in "striking" a jury may be such that the legislature wanted to discourage the practice.

In Illinois, a party demanding a jury in a third class county (Cook County) must pay a $50.00 flat fee. ILL. ANN. STAT. ch. 53, § 51 (Smith-Hurd Supp. 1974). Such a fee has been held valid, Brownell v. Quinn, 47 Ill. App. 2d 206, 197 N.E.2d 721 (1964), and is said to be used generally to defer the expense of the jury system in such large counties, Fried v. Danaher, 46 Ill. 2d 475, 263 N.E.2d 820 (1970). This flat jury fee can be viewed as legislative recognition of the burdensome expense of jury trials in large counties. Yet, all other counties must endure such expenses.

Both of these methods suggest problems. Assessing litigants for civil jury costs raises substantial questions concerning individuals' rights to jury trials and their opportunties to litigate. Use of public funds necessarily involves allocation decisions. Therefore, a reappraisal of the methods of paying civil jury costs is needed. Along with this reappraisal, alternative theories should be examined.

PUBLIC FINANCING

Two rationales may be advanced for public funding of civil jury costs. First, public funding may ensure independence of the jury. If litigants were forced to pay jury costs, members of the jury might be aware that one of the litigants was paying their fees. Thus, they may be influenced in their consideration of the facts. However, the issue of who pays the jury could be kept from the jurors.[6] Second, public funding may ensure greater access to civil jury trials for all citizens, since potential litigants would not be deterred by jury costs. Other methods, however, might accomplish the same result. Access to counsel, for example, is guaranteed without complete public funding.[7] Similarly, the private sector could provide through litigant payments for the bulk of jury costs. At the same time, the public sector could guarantee access to jury trials for indigent litigants through public payments.

Public funding of civil jury costs suffers from the same disability experienced by all public expenditures for public goods: heavy demand conflicting with limited income. In the case of jury costs which are fixed or rising,[8] no adjustment can be made if a community thinks another ex-

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In Wisconsin the judge is permitted to assess one day's jury costs against the losing party. WISC. STAT. ANN. § 270.165 (1957). But giving jury cost assessment powers to the judge may result in uneven assessments among litigants and cause more lenient courts to be flooded with jury demand cases. The problems of expense to the county and the cost in judicial time and efficiency would still exist.

6. Such a policy of nondisclosure would be similar to the general rule that a defendant's insurance coverage is inadmissible and an improper subject for cross-examination. Cartier v. Young, 31 Mich. App. 151, 187 N.W.2d 545 (1971). *See generally* CAL. EVID. CODE § 1155 (West 1966); PROPOSED RULES OF EVIDENCE FOR U.S. COURTS AND MAGISTRATES, Rule 411 (1972); Annot., 4 A.L.R.2d 761 (1949).

7. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

8. *Compare* 1972 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 213 (1973) [hereinafter cited as 1972 ANNUAL REPORT] *with* 1969 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 149 (1970) [hereinafter cited as 1969 ANNUAL REPORT].

Federal Judiciary appropriations (excluding the Supreme Court):

1969—$106,982,000 1972—$171,264,000

Jury Fee Appropriations:

1969—$11,900,000 1972—$18,030,000

Figures for federal courts suggest that jury costs are in fact rising. The number of civil jury trials actually conducted increased 5% from 1971 to 1972 and the number of

penditure more important. When pressures, such as inflation, increase, other services must be reduced because jury costs are a fixed expenditure which cannot be reduced.[9] Increasing demands on public funds suggest a need for an alternative system of funding which relieves some of the public burden while not reducing public access to jury trials.

Losing Litigant Financing

Some states assess civil jury costs against the losing party.[10] For example, if the party demanding the jury trial prevails, then the jury costs which were originally his or her expense along with the other court costs may be assessed against the opposing party. However, if the demanding party loses, his or her liability for jury costs remains.

Although this plan removes jury costs from the public sector and places them on the system users, it raises some serious questions. First, a person's right to a "day in court" may be adversely affected. For example, a party's demand for a jury trial during pretrial settlement negotiations may pressure the opposing party to weigh possible jury costs in appraising an offer. By adding the potential burden of jury costs to litigation, a party may feel forced to compromise a claim and thereby waive rights to trial of the issue. While in many cases it is beneficial from the standpoint of both time and public money to have a settlement, such economy measures can inhibit the weaker party's maneuverability

civil jury cases filed during the decade of the sixties increased at a rate of approximately 5% per year. 1972 Annual Report, *supra*, at 158, 111. According to federal court statistics, juror fees do cost the taxpayer a lot of money: (1) ten cents out of every judicial dollar goes to jury fees, *id.* at 212; and (2) jury costs were budgeted for fiscal 1972 at $18,030,000. The average jury cost per diem is $24.79. *Id.* at 164. The average length of a jury trial is approximately 2.5 days. *Id.* at 352. Therefore, if a twelve-man jury is assumed, the average cost of a jury trial is approximately $750. There were 3,677 civil jury trials in federal courts in 1972. *Id.* at 159. These figures do not include the cost of impaneling a jury, which would probably substantially increase these dollar figures.

9. A simple example demonstrates this. County X works each year under a budget constraint of N dollars. From these dollars the county pays its employees E dollars, provides services for its residents in the amount of S dollars, and pays fees of the jurors in the amount of J. If we assume that in a given year county X budgets to the full amount of its income, then $E + S + J = N$ dollars. During the year three things occur: (1) inflationary pressures result in employee demands for wage increases and the county grants these increases; (2) inflationary pressures cause a rise in the basic costs of running and supplying the government and its services; and (3) the county commissioners refuse to raise taxes and county revenue increases only slightly. The equation would now read $E + S + J > N$ dollars. Assuming that the county cannot incur a deficit for its fiscal period, then some expenditures must be reduced. Salary increases for the employees have been agreed by contract. Jury costs are assumed to be constant or rising. *See* note 8 *supra*. Therefore the county will have no choice but to reduce its services.

10. *See* note 4 *supra*.

by subjecting that party to possible litigation costs.[11]

Another difficulty raised by charging civil jury costs against the losing party is the chilling effect it may have on the right to jury trial.[12] Even though these costs may be recoverable, requiring losing parties to pay jury costs may cause some parties to forego the jury system because of unwillingness or potential inability to pay.[13]

Although this method solves the difficulties of public funding of jury costs, it raises serious problems of its own. Another alternative method of funding which would reduce the public treasury's burden would be to assess insurance companies because of their extensive use of the courts.[14]

Insurance Company Financing

Insurance companies rely on litigation, or the threat of litigation, as a method of cost saving.[15] Although most insurance claims are settled

11. Court costs, excluding jury costs, are taxable against the losing party. *See* note 4 *supra*. By adding the possibility of another expense (jury costs) to the taxable costs, the economically weaker party may be effectively barred from the courtroom unless his or her case is especially strong.

12. U.S. Const. amend. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Many state constitutions have similar provisions. For example, all of the state constitutions in the Seventh Circuit have such guarantees. Ill. Const. art. 2, § 5; Ind. Const. art. 1, § 20; Wisc. Const. art. 1, § 5.

13. *See* text accompanying notes 33-41 *infra*.

14. Although a blanket assessment of insurance companies for jury costs in trials in which they appear may shock the conventional wisdom, consider the developments in products liability. Early cases refused to sustain a defective products action brought by a non-privity party. *E.g.*, Winterbottom v. Wright, 10 Mees. & W. 109, 152 Eng. Rep. 402 (Ex. 1842). The concurrence of Rolfe, B., in that case made the point that "it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced." *Id.* at 116, 152 Eng. Rep. at 405-06. During the next 100 years a complete turnaround in legal thinking occurred, reflecting changes in economic and social policy. The impact of these changes on the approach to products liability is seen in the concurring opinion of Justice Traynor in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944):

> Even if there is no [manufacturer] negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

Id. at 462, 150 P.2d at 440-41.

15. One study suggests that aggressive insurance company litigation techniques could result in substantial savings. One Ohio insurance company was studied from 1949-1953, and from 48 nuisance value cases taken to court, a saving of $200,000 was realized. This saving was determined by subtracting defense costs from the lowest plain-

without a trial, this cost saving approach to litigation and the large number of disputes in which insurance is involved result in a disproportionate use of the judicial system and civil juries by insurance companies.[16] Thus, assessing insurance companies for jury costs for trials in which they are parties would provide relief for public funding retaining access for private individuals.[17]

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tiff settlement figure. For a discussion of this study see Pretzel, *The Economics of Trial Versus Settlement,* 1965 INS. L.J. 453, 460 [hereinafter cited as Pretzel].

16. The bulk of the civil caseload is due to auto accident and personal injury cases. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 64 (1966) [hereinafter cited as KALVEN & ZEISEL]; Landis, *Jury Trials and the Delay of Justice,* 56 A.B.A.J. 950 (1970) [hereinafter cited as Landis]. The 1972 ANNUAL REPORT, *supra* note 8, at 112, notes that approximately 25% of all civil cases filed in federal courts involve personal or property tort liability. At least 10% of the cases filed in 1972 involved insurance companies; motor vehicle tort actions approximated 8.4% and insurance contract actions approximated 1.5%. *Id.* at 115.

Indiana has statutes regulating financial responsibility for auto owners. IND. ANN. STAT. §§ 9-2-1-15, -16 (Code ed. 1973); IND. CODE § 27-7-5-1 (1971), IND. ANN. STAT. § 39-4310 (Supp. 1973). Since very few people can afford to be "self-insurers," IND. ANN. STAT. § 9-2-1-16 (Code ed. 1973), the vast majority of Indiana residents must carry automobile insurance. *See also* BUREAU OF THE CENSUS, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS IN INDIANA, Table 57 (1972). These statistics suggest that a large amount of litigation involves insurance companies. This large scale use of the courts by one group may cause hardship and unnecessary delay for other court users. Recent data suggest that there is a greater delay in civil jury cases than in nonjury ones. 1972 ANNUAL REPORT, *supra* note 8, at 161.

Some writers deny insurance company responsibility for court delay and instead suggest that the blame be placed on the general public who refuse to pay the higher taxes which could be used to increase the number of judges and their staffs to handle this load. Pretzel, *supra* note 15, at 457. Other writers blame plaintiffs for filing suits without merit in the hope that the insurance company will settle such cases out of court. Phillips, *Insurance Companies Are Not Responsible for Court Congestion,* 33 INS. COUN. J. 426, 429 (1966). These are called nuisance value cases. While blaming the public for the problem, such writers recommend that insurance companies increase the number of nuisance value cases brought to trial. It is contended that by litigating these cases, the number of future nuisance value cases will be reduced. Hermann, *Legal Costs to Insurance Companies and How They Can Be Reduced,* 1964 INS. L.J. 133. Hermann suggests that the best way insurance companies can reduce legal costs is to use their defense counsel liberally. This can be done by refusing to settle nuisance cases and litigating instead. Once it is known that the company will not settle these cases, fewer such cases will be filed. *Id.* at 136. These writers always assume that in all cases of litigation a jury will be present. *See, e.g.,* Appleman, *Jury Verdicts and Insurance Rates,* 1962 INS. L.J. 714, 717 [hereinafter cited as Appleman].

Landis states that 80-90% of jury verdicts are for less than $5,000. Landis, *supra* at 951. A study in Cook County (Chicago), Illinois, found that 75% of the verdicts were under $10,000. Pretzel, *supra* note 15, at 460. The large proportion of small judgment cases suggests that insurance companies are litigating their nuisance value cases and at a large cost to the taxpayer.

17. This proposal envisions insurance companies paying jury costs in all jury trials in which they are involved, regardless of which party demanded the jury. Because insurance companies use the courts frequently, assessment of jury costs, even when demanded by the opposing party, would help alleviate cost burdens. Similarly, semi-trailer trucks are assessed disproportionate road use taxes for highways, as compared to automobiles, presumably because of the heavy use they make of those highways. IND. ANN. STAT. §§ 6-6-4-1 to -3 (Code ed. 1972) (carrier road tax); IND. ANN. STAT. §§ 6-6-5-1 to -4 (Code ed. 1972) (auto excise tax).

Moreover, insurance companies could pass these costs on to their policyholders. While private individuals would continue to bear some civil jury costs through increased premiums, this method seems more desirable than the current system using public or litigant funds. Only those who hold insurance and benefit from insurance company litigation practices would pay for company generated jury costs.[18] Jury costs in other litigation would continue to be funded by either the public treasury or individual litigants.

Such a system would have to be created by statute. Courts have no inherent power to assess costs and can only assess in the manner provided by a statute.[19] Attempts by courts to assess costs outside the bounds of a statute have been reversed.[20] However, the legislature's creation of insurance company financing of civil jury costs would raise significant constitutional questions.

Many states have prohibitions in their constitutions against passing special laws[21] in certain enumerated areas.[22] In states without such con-

18. Even though most people carry some form of insurance, *see, e.g.*, note 16 *supra*, insurance prices vary. If all insurance companies were equally affected by this assessment, then their incremental cost increase would also approximately be equal. Consumers would still be able to purchase the lowest cost policies, reflecting their free market choice, rather than, at present, publicly funding the juries. Presumably, if insurance companies were affected differently, their cost increases would also differ.

19. *E.g.*, Gibson v. Thrifty Drug Co., 173 Cal. App. 2d 554, 343 P.2d 610 (1959); Heimann v. City of Los Angeles, 91 Cal. App. 2d 311, 204 P.2d 955 (1949); Stayner v. Bruce, 123 Ind. App. 467, 110 N.E.2d 511 (1953).

20. *E.g.*, Daily v. Leigh, 2 Ill. 2d 499, 119 N.E.2d 204 (1954); Adams v. Silfen, 342 Ill. App. 415, 96 N.E.2d 628 (1951); Hodges v. Lister, 207 Kan. 260, 485 P.2d 165 (1971).

21. A special statute is one that does not have uniform operation. *See, e.g.*, Reid v. Robertson, 304 Ky. 509, 514, 200 S.W.2d 900, 903 (1947). Its classifications are based on artificial, arbitrary, or fictitious conditions making the classification of the special statute unjust. Mathews v. State, 202 Ill. 389, 402, 67 N.E. 28, 33 (1903); *see also* 50 AM. JUR. *Statutes* § 7 (1944). For example, a statute requiring blue-eyed auto owners to show proof of financial responsibility for death, injury, or property damage resulting from an auto accident would be special. This classification would be based on artificial conditions. There is no valid reason for requiring only blue-eyed auto owners to show financial responsibility. The statute carves out a group from a broad class with no rational connection between eye color and the purpose of the statute — making sure victims of auto accidents are compensated. A general statute is one with uniform operation or with a reasonable, permissible classification. Henderson v. State *ex rel.* Stout, 137 Ind. 552, 564, 36 N.E. 257, 260 (1894); *id.* at 572-74, 36 N.E. at 263 (McCabe, J., dissenting); 50 AM. JUR. *Statutes* § 6 (1944).

However, a statute may appear to be special yet may be considered general. In Hunt v. Rosenbaum Grain Corp., 355 Ill. 504, 509-10, 189 N.E. 907, 910 (1934), the court said:

> An act is not local or special merely because it operates in but one place or upon a particular class of persons or things, provided there is a reasonable basis for the legislative classification. A law may be general notwithstanding the fact that it may operate in only a single place where the conditions necessary to its operation exist.

There are certain factors applied to determine whether a given statute is actually general or special notwithstanding its outward appearance. The classification in the statute

stitutional prohibitions,[23] the fourteenth amendment equal protection clause may be used to invalidate potentially discriminatory laws.[24]

There is a twofold standard for testing the constitutionality of special legislation. First, the statute must be based on a legitimate legislative policy. Second, the classification created by the statute must be rational, not arbitrary. These standards were illustrated by Mr. Justice Cardozo:

> The problem in the last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. . . . If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. . . . If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand.[25]

Applying these standards to a proposed statute assessing civil jury costs against litigating insurance companies, the policy criterion may be met, but the classification seems arbitrary. While the legislature may legitimately address itself to the problems created by insurance company and litigant demands for jury trials, it may not solve these problems by assessing only one member of the class of jury users. The problem of jury costs is not created by a single group, but by all who ask for juries. Moreover, assessing jury costs against insurance companies when the oppos-

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must be based on a distinction which suggests a reason for the statute. The characteristics common to the members of the class must suggest a need for the statute. In analyzing the need or reason for a statute, certain policy considerations should be observed, such as contemporaneous conditions (including the relation between the purpose of the statute and its terms as well as the events that give rise to the need for the statute), and the existing economic, sociological and civic policy of the state. Martin v. Superior Court, 194 Cal. 93, 227 P. 762 (1924). Before suggesting standards for determining whether a law is special or general the court said:

> A law is not special legislation merely because it does not apply to all persons. It is a settled principle of constitutional law that the legislature may classify for the purpose of meeting different conditions, naturally requiring different legislation, in order that legislation may be adapted to the needs of the people.

Id. at 100, 227 P. at 765.

22. *E.g.*, IND. CONST. art. 4, § 22. This section prohibits the General Assembly from passing special laws in a variety of enumerated areas, including summoning and empaneling grand and petit juries and providing for their compensation.

23. Connecticut, Maine, Massachusetts, New Hampshire, Ohio, Rhode Island, Vermont.

24. There is a close relationship between state constitutional prohibition of special laws and the fourteenth amendment due process clause. Both act to prohibit the states from passing laws with classifications based on artificial or arbitrary conditions. 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 2125 (3d ed. 1943 F. Horack, Jr. ed.) [hereinafter cited as SUTHERLAND].

25. Williams v. Mayor & City Council, 289 U.S. 36, 46 (1933).

ing party demands the jury is even more arbitrary. Even if insurance companies were assessed only for the costs of juries they demanded, such a statute would still not meet the non-arbitrary criterion.[26] The "vice" of special statutes is that they do not embrace all members of the

> class to which they are naturally related; they create preferences and establish inequalities; they apply to persons, things or places possessed of certain qualities or situations, and exclude

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26. One other possibility would be to enact local laws which assessed civil jury costs against insurance companies in those jurisdictions where they frequently demand juries. In interviews with Douglas R. Bridges, Judge, Superior Court #2, Monroe County, Indiana, the following figures for his court for the end of January 1974 were obtained. Number of civil cases pending were 227; as of that date, 18 jury trials were demanded — 8 by plaintiffs and 10 by defendants. Judge Bridges suggested that from past experience most, if not all, of the defendant demands were by insurance companies. However, it was impossible to tell from the face of the demand since most cases were filed in the name of a defendant for whom the insurance company was subrogating.

It appears that some of the plaintiff demands could also involve insurance companies — in the case where there is insurance company v. insurance company. These figures, Judge Bridges agrees, suggest that insurance companies frequently demand juries in Monroe County for which the government pays.

Appleman contends that many insurance companies have their attorneys demand jury trials in all suits they defend. Appleman, *supra* note 16, at 717. Several reasons for this may be suggested. Juries are sufficiently objective and sophisticated to view a case on its merits and not be duped by sympathy-generating techniques. *Id.* Further, juries are aware of the need to hold down awards. Pretzel, *supra* note 15, at 457. For example, a study from 1962-1968 found that jury awards had not changed in Cook County (Chicago), Illinois, and had risen only slightly in New York City. *Id.* at 456. Another reason is the contention that juries return lower verdicts than do judges. Appleman, *supra* note 16. Although this may be true in some jurisdictions, a study by Kalven and Zeisel suggested that jury awards average 20% higher than those of judges. KALVEN & ZEISEL, *supra* note 16.

A law assessing insurance companies for jury costs by jurisdictions in which they demand such juries would be a local law. A local law's operation is confined within territorial limits other than those of the whole state. Ravitz v. Steurele, 257 Ky. 108, 115, 77 S.W.2d 360, 364 (1934). Many local law classifications are based on population. In Illinois, a statute requiring that the party demanding a jury in a third class county must pay a $50 fee has been held valid. Fried v. Danaher, 46 Ill. 2d 475, 263 N.E.2d 820 (1970); Brownell v. Quinn, 47 Ill. App. 2d 206, 197 N.E.2d 721 (1964). The courts reasoned that special circumstances of largely populated areas made it necessary that such a fee be charged to help both in deferring expenses and in docketing the cases. The key point was that such a classification was reasonable for big counties and other counties would not be excluded if their population reached a certain level.

An Ohio court held the contrary, contending that a flat fee charged in Cuyahoga County (Cleveland) to jury demanders was unconstitutional because the right to a jury trial is so basic and general that such a classification involving jury trial was unreasonable. Silberman v. Hay, 59 Ohio St. 582, 53 N.E. 258 (1899).

> Such a local law, however, would be subject to the same tests as special legislation. Local political subdivisions [of a state] may be classified for any purpose if the classification bears a reasonable relation to the purpose of the act. If the subject matter is arbitrarily limited, the result is identification and not classification and the act is invalid.

SUTHERLAND, *supra* note 24, at § 2109. Thus, it too would fall under constitutional attack.

> from their effect other persons, things or places which are not dissimilar in these respects.[27]

Thus, a statute assessing only insurance company litigants must fall in the face of the special legislation rules.

PROGRESSIVE USER TAX FINANCING

The alternative of a progressive user tax would result in those parties demanding many juries bearing the greatest burden of the costs, while not suffering from the deficiencies of an arbitrary system. The problems pointed out above indicate the need for formulating another approach.

Under a progressive user tax, civil jury costs would be assessed against those who demand juries on a progressive schedule.[28] This schedule would be based on the number of jury trials demanded by one party during a given time period. As a party demands more juries, the rate of that party's costs will increase. For example, if one party demands five jury trials in a given time period and another party demands fifteen, then the first party will pay a lower percentage on his or her sixth jury trial than the second party will pay on his or her sixteenth.

A progressive rate structure is generally more equitable than other structures. Its rate increases as the base of the taxpayer increases. The base for the progressive rate in the jury cost alternative would be jury demands. The purpose of the progressive rate is to impose the greatest tax

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27. Town of Longview v. City of Crawfordsville, 164 Ind. 117, 123, 73 N.E. 78, 80 (1905) (holding a city annexation statute unconstitutional).

28. The constitutionality of progressive taxation has been upheld in a number of cases. Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916); Knowlton v. Moore, 178 U.S. 41 (1900); Swallow v. U.S., 325 F.2d 97 (1963), *cert. denied*, 377 U.S. 951 (1964). In *Brushaber*, the petitioner argued that a progressive income tax was based on wealth alone and therefore repugnant to the due process clause of the Constitution. The Court said that such an argument had no basis since the due process clause does not conflict with the taxing power clause in the Constitution:

> the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause.

240 U.S. at 24. In *Knowlton*, the petitioner argued that a progressive tax was so "repugnant to fundamental principles of equality and justice that the law should be held to be void . . . ." The court replied by saying that historically and economically, a progressive tax was more equitable than other taxes. 178 U.S. at 109. Furthermore, the power of taxation is a purely legislative function and in the absence of proof that the tax is arbitrary or confiscatory, the court has no power to act. *Id.* at 109, 110.

The "other taxes" talked about by the *Knowlton* court are proportional taxes. A proportional tax is one that taxes each dollar (or gallon of gas, cigarette pack or bottle of liquor) at the same rate regardless of the total income of the taxpayer. W. BLUM & H. KALVEN, THE UNEASY CASE FOR PROGRESSIVE TAXATION 3 (1953) [hereinafter cited as BLUM & KALVEN].

on the individuals with the largest base. Here, the justification for imposing a progressive rate on jury demands is the "benefit" test.[29] The thrust of this test is that those who pay the highest rate derive the greatest benefit from the government services. It is apparent that the frequent jury demander benefits more than the infrequent from the jury system. However, only if certain factors are present will the utility of greater demands rise faster than the demands themselves so as to justify the progressive rate. This would be the case if the greater jury demands were made for business policy reasons. For example, where it is the policy of an insurance company to demand juries to deter nuisance value suits, the later demands will necessarily be of more utility than the earlier. As demands become more frequent, more potential nuisance value litigants will be deterred.

The progressive user tax for jury financing, however, raises two constitutional questions. First, since such an assessment would be a tax,[30] it must be determined whether taxing jury demanders is a valid exercise of the taxing power. The general rule is that a tax may not be a penalty, because the legislature does not have the constitutional authority to impose penalties.[31] A progressive jury demander tax, however, would be an excise tax on an institution to defer the institution's expenses, not a penalty imposed on those who used the institution. In discussing excise taxes, the United States Supreme Court has stated:

> It is conceded that a federal excise tax does not cease to be valid merely because it discourages or deters the activities taxed. Nor is the tax invalid because the revenue obtained is negligible. . . .
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> . . . .
>
> Unless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.[32]

Thus, taxing jury demanders imposes no unconstitutional penalty on the user. While it may be a pecuniary inconvenience, the public need for

29. BLUM & KALVEN, *supra* note 28, at 35-39.

30. If the flat fee charged all jury demanders is considered to be a tax on litigation, Adams v. Corriston, 7 Minn. 456, 461 (1862), then jurisdictions which have such a statute (*e.g.*, Cook County, Illinois; ILL. ANN. STAT. ch. 53, § 51 (Smith-Hurd Supp. 1974)) have a proportional tax on jury demands. BLUM & KALVEN, *supra* note 28, at 3.

31. Child Labor Tax Case [Bailey v. Drexel Furniture Co.], 259 U.S. 20 (1922).

32. United States v. Kahriger, 345 U.S. 22, 28, 31 (1953) (footnote omitted) overruled on other grounds, Marchetti v. United States, 390 U.S. 39 (1968).

an equitable method of defraying civil jury costs justifies the imposition of a reasonable excise tax.

Second, a progressive user tax might result in restricting or chilling the exercise of the right to jury trial. The seventh amendment preserves the right to jury trial in the federal courts.[33] Most state constitutions contain similar provisions.[34] However, the object of these guarantees is to preserve the right, rather than the procedure by which it is implemented.[35]

> So long as [the substance of the right to jury trial] is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature . . . .[36]

While it is inevitable that a user fee will deter jury use, it does not follow that such use will be unconstitutionally chilled. A statute could ensure access for nonindigents by providing that the first few trials be free or by setting the rates at a very low amount. Access for indigents could be preserved by the waiver of jury fees. There is less concern for frequent jury demanders because it is assumed that they will be able to bear or pass on jury costs.[37] Thus, a progressive user tax on civil jury costs will not interfere with the constitutional right of trial by jury if the substance of the right is not restricted.

Pricing the exercise of constitutional rights has been permitted where it does not result in absolute deprivation. Even where the Supreme Court has required that litigation services be provided free to indigents, such as filing fees for divorces[38] or attorneys for criminal defendants,[39] it has not required that these services be free to all.[40]

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33. *See* note 12 *supra.*

34. *Id.*

However, not all states guarantee the right to a civil jury trial in their constitutions. LA. CONST. art 1, § 9; UTAH CONST. art 1, § 10. The Supreme Court has refused to incorporate the seventh amendment into the fourteenth as a requirement upon the states. Walker v. Sauvinet, 92 U.S. 90 (1876). *See also* Melancon v. McKeithan, 345 F. Supp. 825, 1035-36 (1972).

35. People v. Kelly, 347 Ill. 221, 179 N.E. 898 (1931).

36. Walker v. New Mex. & So. Pac. R.R., 165 U.S. 593 (1897), *cited in* People v. Kelly, 347 Ill. 221, 225, 179 N.E. 898, 900 (1931).

37. *See* notes 16 & 26 *supra.*

38. Boddie v. Connecticut, 401 U.S. 371 (1971).

39. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

40. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court held that a state which had mandated a procedure of going to court for obtaining a divorce could not, consistent with the due process clause, deny indigent litigants access to those courts through fee requirements. *But cf.* United States v. Kras, 409 U.S. 434 (1973) (the Court refused to extend *Boddie* to bankruptcy litigation fees because, *inter alia,* there was no state mandate of procedure); Ortwein v. Schwab, 410 U.S. 656 (1973) (the Court refused to extend *Boddie* to cover filing fees in an appeal of an agency hearing concerning welfare reduction, in part because the agency hearing fulfilled the due process re-

In two early cases, state courts upheld the constitutionality of jury demander fees by using a similar analysis.[41] Both cases concerned a statute prescribing a flat fee to be paid by the party demanding a jury trial. One court said:

> The constitution does not guarrantee [*sic*] to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy in the law, or impede the due administration of justice.[42]

A progressive user tax would be constitutional so long as the progressivity is justified by a reasonable relationship to the benefits received and the rate structure is designed so as not to unreasonably chill constitutionally protected rights.[43]

CONCLUSION

There are two practical drawbacks to the progressive user fee. First,

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quirement).

Read together, *Boddie, Kras* and *Ortwein* suggest that if court litigation is a person's only opportunity for a due process hearing and if state procedure requires court intervention in disputes, then indigent litigants cannot be denied access to courts for failure to file the required fees.

41. Williams v. Gottschalk, 231 Ill. 175, 83 N.E. 141 (1907); Adams v. Corriston, 7 Minn. 456 (1862).

In *Williams,* the plaintiff refused to pay a required six dollar fee when he demanded a jury. The municipal court refused the demand, and that action of the court was appealed as error. The plaintiff argued that the statute contravened the state constitution, which guaranteed the right to jury trial as inviolate. Such a fee, it was argued, was a denial of or interference with the right to jury trial. The court said that it had frequently been held that fixing jury fees at a reasonable amount to be paid by the demander did not violate the right to jury trial. The court then quoted the reasoning of the court in *Adams.* In *Adams,* one of the points raised on appeal was that there was error in denying the defendant a jury trial when he refused to advance a required three dollar jury fee when he demanded a jury. The defendant claimed that this violated his constitutional right to a jury trial. The court said that the argument was not that the fee was unreasonably high, but that it was charged at all. The court held that there was no valid objection to a reasonable fee. The court also said that the jury fee, whether considered a tax on litigation or as a part of expenses incurred on a party's own behalf, was no more objectionable, constitutionally, than clerk, sheriff or other such fees. If the constitution is to be interpreted as commanding litigation without expense, then all fees, from summons to judgment, would be at an end. The reasoning of *Adams* was also applied in a more recent case to dispose of a due process argument about a fifty dollar flat jury fee. Fried v. Danaher, 46 Ill. 2d 475, 479, 263 N.E.2d 820, 822 (1970).

42. Adams v. Corriston, 7 Minn. 456, 461 (1862).

43. A system might allow a litigant to build credits from nonjury trial use in periods A and B to be applied to jury use in period C. An appropriate time period would have to be determined for which jury use would be computed. The length of the time frame would require a legislative balance. On one hand, the period will have to be long enough to enable the progressive schedule to operate as intended, and, on the other, the period will have to be short enough so the statute can survive special statute or equal protection attacks.

the courts may have difficulty in determining which party has demanded the jury and the number of demands made over the requisite time span. Parties may attempt to conceal or change their identities to avoid paying user fees. The progressive user fee would be feasible only if the legislature developed an adequate system for record keeping.

Second, in some areas, the lack of parties who frequently demand jury trials may result in a small return for the public treasury. This is a problem associated with the demographic characteristics of the jurisdiction, however, and not an inherent limitation of the progressive user fee system.

In view of these potential drawbacks of the progressive user fee alternative, a state wishing to adopt it would need a detailed cost-benefit analysis to see if any real savings could be expected. Yet, where effective, this method would be more equitable than the public and litigant funding systems in operation today.

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